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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court wrote no opinion. The order dismissing the indictment is set forth at R. 6–7.

JURISDICTION

On September 8, 1958, the district court dismissed the indictment on the ground that it did not state an offense under 18 U.S.C. 371 (R. 6–7). Notice of appeal to this Court was filed in the district court on October 7, 1958 (R. 7–8). Probable jurisdiction was noted on January 26, 1959, 358 U.S. 944 (R. 8). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment, based on a construction of the statute on which the indictment is founded, is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

QUESTION PRESENTED

Whether 18 U.S.C. 371, punishing conspiracy of two or more persons to commit an offense against the United States, covers a conspiracy between husband and wife.

STATEMENT

The indictment charged that appellees, who are husband and wife, conspired with each other to smuggle and illegally import into the United States psittacine birds, and to conceal and transport the birds after illegal importation (R. 2–4). Appellees moved to dismiss on the ground that the indictment failed to charge an offense (R. 5). The district court dismissed the indictment on the authority of *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U.S. 687, and *Gros* v. *United States*, 138 F. 2d 261, two decisions of the Ninth Circuit to the effect that

a husband and wife are incapable of engaging in a criminal conspiracy (R. 6–7).

SUMMARY OF ARGUMENT

1. The question whether husband and wife have the capacity to conspire is not answered by the federal conspiracy statute, 18 U.S.C. 371. While making it a crime for "two or more persons" to agree to commit a federal crime, the statute left to the development of the common law questions of the capacity of persons to make such agreements. Nor does the supposed antiquity of the common law rule that husband and wife are one, and hence lack the capacity to conspire, require its continued acceptance today. As this Court has frequently recognized, the "peculiar boast and excellence" of the common law is its flexibility and its capacity to adapt to changed conditions. *Hurtado* v. *California,* 110 U.S. 516, 530; *Funk* v. *United States,* 290 U.S. 371, 382–383. If, as we contend, the concept of marital unity on which the rule is based has no validity today, and no new justification for the rule can be found, the rule can and should be rejected by this Court.

2. Although the ancient notion that husband and wife are one was early proclaimed by commentators to make impossible a conspiracy between them, there was in fact little, if any, direct case authority for the rule in the early common law. Nor were the implications of the unity concept ever fully accepted in other areas. Thus, for example, a wife could be joined with her husband in a conspiracy with a third party, be held for inciting her husband to crime, and be charged

for a substantive offense committed without the presence or participation of her husband.

Whatever its validity at an earlier age, however, the changed status of the wife deprives the unity concept of any continued vitality today. The wife enjoys civil and political rights fully equal to those of her husband. Similarly, the major common-law immunity of a wife from criminal liability—the presumption that a wife committing a crime in the presence of her husband acted under his direction—has all but disappeared. Formerly conclusive, the presumption is now universally rebuttable by a slight showing of independence of action, and in many jurisdictions the defense has been abandoned altogether. The common ground of the modern decisions on the question is their recognition of the changed status of women and their refusal to be bound by a precept of a bygone age.

Recognizing the lack of validity of its historical basis, the courts of appeals for the District of Columbia and the Fifth Circuits, as well as the courts of several states, have already rejected the rule that husband and wife cannot conspire. Unless there is a modern-day justification for its retention, this Court should, we submit, follow their lead.

3. The controlling question, therefore, is whether there are any considerations valid today which justify retention of the rule. It is our view that there are not, and that those that have been suggested are simply evidentiary considerations which might be relevant to the conduct of the trial of such cases but

which cannot support an absolute rule of immunity from substantive liability.

The argument resting upon the needs of marital privacy and confidence would unnecessarily give to the marital pair a substantive immunity not enjoyed in any other relationship of confidence or intimacy. Prevailing evidentiary rules barring adverse spousal testimony fully protect the intimacies of marriage. While those rules may sometimes make adequate proof of the conspiracy impossible, that affords no reason for relieving the couple from liability if the Government is able to prove their criminal conspiracy by acceptable evidence from other sources.

The arguments stressing the unique nature of the crime of conspiracy and the unlikelihood of an arms-length agreement between husband and wife likewise would justify at most only the imposition of more rigid standards of proof and not a complete immunity. Congress determined long ago that conspiracy is a societal danger that should be punished. Husband and wife, now discrete persons in practice as well as in theory, have been universally recognized as capable of contracting with one another. When their agreement is one to commit a crime, the additional threat to society resulting from their concert of action is as great as that flowing from any other combination. It may, indeed, be even greater, for the relationship of intimacy which they enjoy provides a unique opportunity for collaboration without fear of suspicion and may give to their joint scheme a cohesiveness lacking in a conspiracy among strangers.

Finally, none of the arguments advanced justify the dichotomy they would perpetuate between a married woman's substantive criminal liability and her immunity from conspiratorial liability. No aspect of the marriage relationship is apparent, for example, that would justify a distinction between a wife's liability for aiding and abetting her husband in the commission of a crime and her liability for conspiring with him to commit it, but she is admittedly liable as a principal for the former. And if the object of the conspiracy succeeds, the wife's conspiratorial participation would normally seem to be enough, by itself, to make her liable for the substantive offense. Since there is no general federal attempt statute—that function being largely performed by the conspiracy statute—immunizing husband and wife from liability for conspiracy as such in effect simply frees them from punishment unless their conspiracy is successful.

In sum, the arguments advanced for retention of the rule seem only to dress it in modern-day garb without in fact providing any better reason for the rule than does the discredited unity concept. Its historical basis having lost its vitality, and no adequate modern-day justification having arisen to take its place, the rule, under settled principles, should cease to exist.

ARGUMENT

I

THE QUESTION WHETHER HUSBAND AND WIFE ARE SEPARATE PERSONS FOR THE PURPOSES OF THE CONSPIRACY STATUTE MAY BE DECIDED BY THIS COURT IN THE LIGHT OF REASON AND EXPERIENCE

18 U.S.C. 371, the general conspiracy statute, makes it a crime for "two or more persons" to conspire to commit an offense against the United States. Appellees were charged with conspiring to smuggle psittacine birds into the United States in violation of federal law. The decision below holds that they are not liable under 18 U.S.C. 371 since, being husband and wife, they are not two persons for the purposes of that statute, but one.

The question is of substantive liability. There is no issue of the right of one spouse to testify against the other, as in *Hawkins* v. *United States*, 358 U.S. 74, or of the right of the government to compel a wife to testify as a person injured by her husband, as in *Wyatt* v. *United States*, No. 119, now pending before this Court. Nor is there a question of the extent of the evidence necessary to show a conspiratorial agreement between husband and wife, such as whether, in the light of the close association stemming from the relationship, more evidence might be needed to show agreement than if other persons were alleged to be conspirators. The effect of the ruling below is that, no matter what the proof may be of actual agreement and active cooperation between husband and wife, no matter what the proof may be that each, individually, engaged in acts in

furtherance of that agreement, the husband and wife are immune from the punishment that is imposed on all other persons who agree to engage in crime.

If the statute were read literally in the light of present-day concepts, there would be little question that husband and wife could be liable as conspirators. The statute forbids an agreement between "two or more persons" to commit a federal crime, and in today's concepts husband and wife are undeniably two "persons" who may so agree. We recognize, however, that that may be too facile an approach. While conspiracy as a federal crime stems from the Act of March 2, 1867, 14 Stat. 471, 484, both the concept of conspiracy as a crime and the concept of the unity of husband and wife have their roots in the common law. While making conspiracy a statutory crime, the statute did not say what persons were capable of conspiring, but left to the courts, as before, the function of defining, by the processes of the developing common law, the capacity of persons to enter such agreements. If the capacity to make the agreement be otherwise recognized by the law, the statute makes the agreement unlawful, but, if the capacity be denied, there can be no agreement and hence no violation of the statute. At bottom, therefore, the question here is not so much one of statutory interpretation, in the strict sense, as it is one of judicially defining the juridical capacity or status of husband and wife for this purpose.

The common law rule that husband and wife, being one, are incapable of conspiracy is admittedly of ancient, if dubious, origin. If lacking in modern-day

justification, however, its antiquity alone cannot save it. "The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end."[1] It is its "flexibility and capacity for growth and adaptation" that is "the peculiar boast and excellence of the common law." *Hurtado* v. *California,* 110 U.S. 516, 530. As this Court observed in overruling no less ancient a rule—the incompetency of one spouse to testify on behalf of the other—"the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions"; the courts are not "forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time"; it is rather the duty of a court, "in the light of fundamentally altered conditions," to decide a question presented to it "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past". *Funk* v. *United States,* 290 U.S. 371, 382–383.[2]

The rule that husband and wife are incapable of conspiring is, we believe, such a rule. As we shall show, it rests upon a metaphysical notion of the unity

[1] Cardozo, *The Growth of the Law* (1924) 104–105, approving the abolition in New York, in *Oppenheim* v. *Kridel,* 236 N.Y. 156, of the ancient rule that a married woman, because deemed to have no interests or rights of her own, could not maintain an action for criminal conversation.

[2] See also Rule 26, F. R. Crim. P; *Wolfle* v. *United States,* 291 U.S. 7; *Lutwak* v. *United States,* 344 U.S. 604; *Weiler* v. *United States,* 323 U.S. 606; *Hawkins* v. *United States,* 358 U.S. 74; cf. *Girouard* v. *United States,* 328 U.S. 61, 69–70.

of husband and wife which, examined in the light of present-day concepts of the nature of marriage, can no longer sustain it. Nor are there other considerations more relevant to our time and place that afford a new justification for retention of the rule. It is, therefore, but a relic of the past which should now be abandoned.[3] The courts of appeals for the District of Columbia and the Fifth Circuits have already so held,[4] and it is their view, rather than the outmoded one adopted by the Ninth Circuit in decisions which the district court felt bound to follow,[4] that we submit should be adopted by this Court.

II

THE OLD COMMON LAW RULE THAT HUSBAND AND WIFE CANNOT CONSPIRE TOGETHER CAN NO LONGER BE SUPPORTED BY ITS HISTORICAL BASIS

A. THE RULE DERIVED FROM, AND TO THIS DAY, WHERE IN FORCE, IS SUSTAINED UPON, THE ANCIENT NOTION OF CONJUGAL UNITY

1. The precept that husband and wife cannot conspire one with the other owes its origin to the ancient doctrine of marital unity—*i.e.*, that husband and wife are one, that one being the husband. The doctrine had a biblical origin, and from that source passed into the English law as a maxim describing the marital

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[3] *Johnson* v. *United States*, 157 F. 2d 209 (C.A.D.C.); *Thompson* v. *United States*, 227 F. 2d 671 (C.A. 5); *Wright* v. *United States*, 243 F. 2d 569 (C.A. 5), certiorari denied, 355 U.S. 831.

[4] *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied on others issues, 271 U.S. 687; *Gros* v. *United States*, 138 F. 2d 261 (see *supra*, pp. 2–3).

relationship. See Williams, *The Legal Unity of Husband and Wife,* 10 Mod. L. Rev. 16–18 (1947).[5]

The earliest formulation we have found of the doctrine as the basic premise of the rule that husband and wife cannot conspire together appears in the early 16th century writing of Fitz-Herbert, who claimed (1 *Natura Brevium* (9th ed. 1794) 116 L.):

> And a man shall not have a writ of conspiracy for indicting him of felony, against husband and wife, because they are but one person; but against husband and wife and a third person it well lieth.

Hawkins, writing in the 18th century, is, however, generally credited with being the basic architect of the doctrine, giving it the authority of a fixed concept of the common law. Speaking of the Third Ordinance of Conspirators (33 Ed. 1, 1304), he observed (1 *Pleas of the Crown* (6th ed. 1777) 351):

> It plainly appears from the words of the statute, That one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows * * * That no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.

[5] Bracton talked of husband and wife "who are as it were one person, being one flesh and one blood". 6 Bracton, *Laws and Customs of England* (Twiss 1883) 392, 393. Later, Lord Coke espoused the doctrine (Coke, *Littleton* 6b). And Blackstone thereafter wrote that "the husband and wife are one person in law: * * * that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband * * *". 1 Blackstone, *Commentaries* (Lewis ed. 1897) 411.

Despite Hawkins' authoritative formulation of the rule, neither he nor Fitz-Herbert could rely on clear judicial decisions. Two decisions of the 14th Century, in the reign of Edward III, cited as authority for the rule, were actually cases in which a husband and wife were joined with others in the conspiracy charge. In neither was any opinion expressed that husband and wife could not conspire.[6] *R.* v. *Cope* (1719), 1 Strange 144, 93 Engl. Repr. 438, although subsequently relied upon in support of the rule, does not mention it. It held that husband and wife, joined by servants, could be convicted of conspiracy, the court noting, indeed, that the intimate relationship of the parties was strong circumstantial evidence of the conspiratorial agreement there charged. So also, in *R.* v. *Locker*, 5 Esp. 106 (1804), where husband and wife and a third party were joined in the conspiracy charge, the court ruled 'only that the wife of the third party was not a compellable witness by the husband and wife.'[7] Similarly, the basic exception to the rule—*i.e.*, that the moment a third party joins the scheme all three can be jointly charged and convicted for conspiracy—was not articulated as an "exception" at

[6] Y.B. (1363/64) 38 Ed. III, f. 3; Y.B. (1345) 19 Ed III. The unsatisfactory nature of these decisions as authority for the rule is pointed out in Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921) 64; Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 20, n. 16 (1947); Note, 27 Col. L. Rev. 219 (1927).

[7] Significantly, in a later English decision where the husband and wife and wife's brother were charged with conspiracy, the prosecution indicated to the jury that they might well infer from the facts that anything "the wife did was under the influence and in consequence of coercion by her husband". The

all in the alleged case authority. See *R.* v. *Cope*, 1 Strange 144, 93 Engl. Repr. 438, *supra*; *R.* v. *Whitehouse* (1852) 6 Cox C.C. 38 (conviction of husband, wife and daughter).[8]

While there is some dicta in a few later English cases recognizing the validity of the rule upon the unity theory (*e.g.*, *Director of Public Prosecutions* v. *Blady*, 2 K.B. 89, 92 (1912) (Lush J., dissenting); *R.* v. *Peel*, The Times, March 8, 1922, cited in *Kowbel* v. *The Queen*, 110 Can. Cr. Cas. 47, 52 (1954)), it was not until quite recent times that a definite holding was made in Great Britain in support of it. See *Mawji* v. *R.*, 41 Crim. App. Rep. 69, 1 All Eng. Rep. 385 (1957), where the Privy Council, in a case on appeal from Tanganyika, approved the doctrine.[9] Nevertheless, possibly because of its simplicity, definiteness, and seeming "logic," the doctrine was embraced by

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jury thereupon found her not guilty. *R.* v. *Duncan*, 13 J.P. 220 (1849). While the "oneness" doctrine did not apply in that case since a stranger to the marriage was involved in the scheme, the decision, if anything, indicates a different approach to the problem—one which permits indictment and trial of the marital pair, conditioning their guilt upon the particular facts as developed by the evidence. It is akin to the doctrine of coercion utilized in the trial of substantive crimes which imposes a rebuttable presumption that the married woman committing a substantive crime in her husband's presence acted under his command and direction (see *infra*, pp. 21–23).

[8] Also under the rule it has been said that, where the conspiracy occurred before the marriage, no bar to trial after marriage obtained. See *Robinson's Case* (1746), 1 Leach 37, where the marriage itself was the object of the conspiracy.

[9] An eminent English commentator had observed, in 1947, that the rule had never been applied in an English court. Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 21 (1947).

text writers and repeated under the same rationale both by British and American commentators—albeit in some instances with criticism—to this day.[10]

2. The modern decisions which adhere to the rule give no reason for its continuing validity beyond reiterating the concept of marital unity announced by Fitz-Herbert and solidified by Hawkins. Thus, the recent decision of the Privy Council in *Mawji* v. *R.*, *supra*, relied upon Hawkins' formulation of the unity doctrine and observed simply that there was no dispute in that case that under English criminal law husband and wife could not be guilty of conspiracy together." The same rationale was adopted recently in Canada, *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47 (1954) (compare the contrary decision when the case was before the Ontario Court of Appeals, 106 Can. Crim. Cas. 65), and not too many years ago in New Zealand, *R.* v. *McKechie*, [1926] N.Z.L.R. 1, commented on in Note, 27 Col. L. Rev. 219 (1927). In

[10] See, *e.g.*, 4 Blackstone, *Commentaries* (Lewis ed. 1900) 1534 (n. 45); Wright, *The Law of Criminal Conspiracies and Agreements* (1887) 127; 10 Halsbury, *Laws of England* (3d ed. 1955) 291–292, n. (q); 2 Bishop, *Criminal Law* (9th ed. 1923) 130; 3 Burdick, *Law of Crime* (1946) 451; 1 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957) 81; 2 Russell, *Crime* (11th ed. 1958) 1696; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (34th ed. 1959) 21; 2 Stephen, *Commentaries on The Laws of England* (21st ed. 1950) 491–492. As Bishop stated the modern form of the rule (at 130):

"2 Husband and Wife,—being regarded in the law as one person, cannot without other combination commit this offence [citing Hawkins]. But where there is another conspirator, a wife may be joined with her husband in the indictment. In like manner, the husband and his wife may be prosecuted together, for a conspiracy entered into before their marriage."

this country, of the few decided cases dealing with the problem, those that support the rule at all—generally of ancient vintage and stating the rule only as dictum—likewise do so on the "oneness" doctrine.[11]

The rule was accepted on that basis in the Ninth Circuit, *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U.S. 687, although the last time the issue was before that court was in 1943. *Gros* v. *United States*, 138 F. 2d 261. As for the state decisions, the most recent affirmance of the rule we have found was by a trial court in New Jersey. *State* v. *Strück*, 44 N.J.S. 274 (County Ct. 1957).[12] In California, where the indictment in this case was brought, the rule was first applied by the state courts in 1889 in *People* v. *Miller*, 82 Cal. 107, 108.[13] It was grudgingly followed by the District Court of Appeals in 1933 with the comment that "the question merits further consideration by [the California Supreme] Court or by the legislature." *People* v. *MacMullen*, 134 Cal. App. 81, 85. No further consideration has

[11] *State* v. *Clark*, 9 Houst. (Del.) 536 (Ct. Gen. Sess., 1891) (dictum); *State* v. *Christianbury*, 44 N.C. 46, 48 (1852) (dictum: "A husband and wife cannot be indicted for [conspiracy] because in law, they are but one person"); *Commonwealth* v. *Allen*, 24 Pa. Co. Rep. 65 (1900) (dictum); *Commonwealth* v. *Kendig*, 18 Pa. Dist. Repts. 659 (1909) (dictum); *State* v. *Mann*, 39 Wash. 144 (1905) (dictum); *Jones* v. *Monson*, 137 Wis. 478 (1909) (dictum). See cases collected in Anno., 46 A.L.R. 2d 1275.

[12] In *State* v. *Carbone*, 10 N.J. 329, 336 (1952), the rule was noted in dictum.

[13] The *Miller* holding apparently stemmed from the dictum in *People* v. *Richards*, 67 Cal. 412, 415 (1885), that: "* * * one person cannot be guilty of conspiracy; and therefore no prosecution [is] maintainable against a husband and wife only."

been had by the highest court of the state, nor does there appear to have been any later direct affirmance of the rule.[14] In the light of recent criticism of the unity theory in a closely related context by a lower California court, *People* v. *Stately*, 91 Cal. App. 2d 943, 950–951 (1949) (rejecting the common law presumption that a wife who commits a misdemeanor in her husband's presence acts under his coercion), it is not clear that the California Supreme Court would affirm the rule.

It is significant, we believe, that even in the cases upholding the rule no real attempt has been made to support it on any basis other than the theory that husband and wife are one and hence incapable of conspiring with each other.[15] It would seem to follow that if husband and wife are not one, that is to say, if they are separate and distinct individuals, then the rule can have no basis. In short, if the concept of "oneness" is rejected, then the rule must fall with it.

B. THE THEORY OF MARITAL "ONENESS" WAS NOT REALLY ACCEPTED EVEN IN THE ENGLISH COMMON LAW

1. The persistence of the "oneness" concept as the basis of the rule is all the more surprising because it had no real vitality even in the English common law.

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[14] In *People* v. *Keller*, 165 Adv. Cal. App. 469, 474 (1958), and *People* v. *Lizzie*, 41 Cal. App. 2d 797 (1940), there was no decision on the point since the marriages were deemed void.

[15] In *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47, 54 (1954), while relying essentially upon the oneness rationale, Judge Estey noted that a charge of conspiracy between husband and wife could interfere "with that confidential and intimate relationship that should always obtain between husband and wife and which has so long been recognized and protected under our law." See pp. 32–33, *infra*.

Within the conspiracy rule itself, its logic breaks down. If husband and wife are so one that they cannot conspire with each other, it would seem to follow that they could not be separate parties to a conspiracy with others. Yet the very writers who recognized the rule and gave it its rationale at the same time enunciated the exception that, should a third party join the conspiracy, husband and wife could each be joined as co-conspirators and be separately convicted or acquitted. They were thus treated as separate persons, not one.

2. The "oneness' theory had even less validity in other phases of the common law dealing with the criminal responsibility of a married woman. As Hawkins himself recognized, a married woman who committed a substantive offense without the aid or presence of her husband was deemed responsible for her conduct and was subject to separate indictment and conviction, as if she were a femme sole. 1 *Pleas of the Crown.* (6th ed. 1777) 4–5. Even more significantly, a wife could be charged with inciting her husband to commit a crime and be jointly convicted with him.[16]

Perhaps the most important limitation upon a wife's criminal liability at common law was that, if she committed a crime in the presence of her husband or participated with him in a crime, it was presumed that she was acting under his command and direction and

[16] 2 Hawkins, *id.* (6th ed. 1787), at 451: "* * * if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole." See *R.* v. *Manning*, 2 C. & K. 886, 903, n. (a) (1849).

was not guilty even of the substantive offense.[17] While the precise origin of the doctrine is not clear,[18] it rested more and more, as time progressed, upon the principle that a married woman was subservient to

[17] A married woman also was immune from liability as an accessory after the fact to her husband's felony, for receiving stolen property from him, or for stealing his property. See Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507, 509 (1934); 10 Halsbury, *Laws of England* (3rd ed. 1955) 291–292, n. (q), 303. Cf. 2 Stephen, *Commentaries On The Laws of England* (21st ed. 1950) 491–492. While some of those limitations still apply in various states, particularly the bar against liability for concealment of her husband who has committed a felony (*e.g.*, N.J. Stat. Ann. (1953) 2A: 85–2), they may be explained as part of the modern day protection of marital peace and accord rather than as a true application of the unity rationale. Similarly, insofar as there subsist limitations upon inter-spousal tort liability it would seem that the rationale to support continuation of the rule is the desire to promote domestic peace and tranquility. *Thompson* v. *Thompson*, 218 U.S. 611. See generally on the question of civil responsibility, McCurdy, *Personal Injury Torts Between Spouses*, 4 Vill. L. Rev. 303, particularly at 335–338 (1959).

[18] According to some, it may have stemmed originally from the unity concept. Others have placed it principally on the view that the wife was under the control of the husband. It is said also that the main impetus for the rule was the fact that in the early common law an ever-widening circle of males were allowed to escape the death penalty for felonies by pleading benefit of clergy, while women had no such defense until the end of the 17th Century. To avoid the manifest inequity of putting a woman to death for the commission of a felony jointly with her husband while he escaped with a branding of his thumb, the doctrine of coercion evolved. This explanation coincided with the common law view that the doctrine did not apply in treason, murder and perhaps robbery cases or to misdemeanors, since in such instances benefit of clergy was not available to the husband. See Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1012–1013 (1932); Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507, 509–514 (1934).

and under the command of her husband. It was under this rationale that the rule took hold in this country.[19]

3. Even in the field of civil and political rights the disqualifications to which a married woman was subject at common law cannot be explained by recourse to the unity theory. Under that theory, for example, it should have followed that there was a complete union of their separate property rights, or at least that the property interests of the married woman vested in her husband upon marriage. That, however, was never so. While a wife could not alienate a freehold estate without her husband's consent, she continued to own it in her own right, subject only to certain tenancy rights of her husband.[20] And with the intervention of equity in the 16th and 17th century she in fact had property to her own use and disposition. Again, while a married woman could not contract on her own behalf, that was because of her proprietary disabilities during coverture and not because she was not a separate and distinct person. Moreover, a wife could commit a civil wrong either alone or in conjunction with her husband, the liability to be enforced in a

[19] The early cases are collected in Anno., 4 A.L.R. 266; see also Anno., 71 A.L.R. 1116.

[20] It is true that all her chattels accrued to her husband upon marriage, but that is explainable by the fact that the common law courts had surrendered jurisdiction over succession of chattels to the ecclesiastical courts and, in defining marital rights to chattels, focused only upon the inter-vivos relationship of the parties, losing sight of the rights the wife might have as a widow. See 3 Holdsworth, *A History of English Law* (3d ed. 1923) 524.

joint suit against the marital pair. See generally, 3 Holdsworth, *A History of English Law* (3d ed. 1923) 520–533; 4 *id.* 476, 477.

It may be seen, therefore, that the implications of the unity theory were never generally accepted even by the English common law. The truth of the matter was perhaps best summed up by Pollock and Maitland (2 *History of English Law* (1895 ed.) 397–434, 403):

> If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees a "unity of person" between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person. * * *

C. THE CONCEPT OF "ONENESS" HAS NO VITALITY TODAY

1. As time went on, a woman's political and social status was given more and more recognition. The law gave to her, whether single or married, more and more rights. Virtually the last vestiges of a married woman's civil disabilities have been removed in this country by the Married Women Acts.[21] A married

[21] These have been adopted in virtually all of the states. See, *e.g.*, 14 McKinney's Consolidated Laws of New York, Domestic Relations Law (1957) §§ 50–61; Smith-Hurd, Ill. Ann. Stat. (1959) Ch. 68, §§ 1–10; Ohio Rev. Code Ann. 1954) §§ 3103.05–3103.08; Mich. Stat. Ann. (1957 Rev.) Ch. 254, §§ 26.161–

woman may separately acquire and convey property, enter into contracts with third parties as well as her husband, sue and be sued, engage in any occupation, make a will. She may vote and run for office. In short, she enjoys the civil rights and privileges on a par with her husband. Her status, just as that of a single woman, has been made equivalent to that of the male. By 1913, Mr. Justice Holmes could term the unity concept "the now vanishing fiction".[22] Professor Wigmore more severely characterized it as a "piece of semi-medieval metaphysics".[23] However termed, it can no longer support a modern rule of law.

2. In the field of criminal law, the changed status of women has likewise been given recognition. The single most important common law rule limiting a wife's criminal liability—the presumption that a married woman committing a crime in the presence of her husband acted under his coercion (see *supra*, pp. 17–19)—has, for example, undergone marked modification.

Although the presumption was apparently irrebuttable at the early common law, *Trust Co.* v. *Sedgwick*, 97 U.S. 304, 308, it has long since become rebuttable by a slight showing of voluntary independent action on the part of the married woman. Today it appears

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26.181; Ky. Rev. Stat. (1959) §§ 404.010–404.060; 34 Ala. Code (1940) §§ 65–78; Ark. Stat. Ann. (1947) §§ 55–401 — 55–408; 24 Vernon's Mo. Ann. Stat. (1956) §§ 451.250, 451.290. See McCurdy, *Personal Injury Torts Between Spouses*, 4 Vill. L. Rev. 303, 310–312 (1959).

[22] *Williamson* v. *Osenton*, 232 U.S. 619, 625, holding that a wife may have a different domicile than her husband for purposes of a civil suit for damages against his paramour.

[23] 2 Wigmore, *Evidence* (3d ed. 1940) 731.

on its way to complete rejection. In this country, four states have, by statute, abolished the defense of marital coercion altogether.[24] England and 15 states have, by statute, modified it by abolishing the presumption, so that in those jurisdictions the wife has the burden of making out the defense affirmatively.[25] By judicial decision, 5 or perhaps 6 states have ruled that the generally improved status of women, and specific Acts giving married women equal property and political rights, have, by implication, abolished the presumption.[26] While some 18 states still retain the presumption, most recognize that it is a weak one, and all recognize that it is rebuttable.[27]

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[24] 39 McKinney's Consolidated Laws of New York, Penal Law (1944) § 1092; Minn. Stat. Ann. (1947 ed.) § 610.06; Wis. Stat. Ann. (1958) § 939.46; Rev. Code of Wash. (1951) § 9.01.113.

[25] Criminal Justice Act of 1925, 15 and 16 Geo. 5, c. 86, s. 47; 5 Ariz. Rev. Stat. (1956) § 13–134; Ark. Stat. Ann. (1947) § 41–114; Cal. Penal Code Ann. (1955) § 26; Colo. Rev. St. (1953) § 40–1–8; Ga. Code Ann. (1953) § 26–401; Idaho Code Ann. (1948) § 18–201; Smith-Hurd, Ill. Ann. Stat. (1935) Ch. 38, § 596; Ann. Code of Md. (1957) Art. 35, § 7; Mich. Stat. Ann. (1954) § 28.1071; 8 Rev. Codes of Mont. Ann. (1947) § 94–201; 2 Nev. Rev. Stat. (1955) § 194.010; N.J. Stat. Ann. (1953) 2A: 85–3; 21 Okla. Stat. Ann. (1951) §§ 157–158; Vernon's Tex. Penal Code Ann. (1952) Art. 32; 8 Utah Code Ann. (1953) § 76–1–41.

[26] *King* v. *City of Owensboro*, 187 Ky. 21, 23–25 (1920); *State* v. *Renslow*, 211 Ia. 642 (1930); *Morton* v. *State*, 141 Tenn. 357 (1918); *Evans* v. *State*, 188 Tenn. 637, 638 (1949); *State* v. *Hendricks*, 32 Kan. 559, 564–565 (1884); *Smith* v. *Meyers*, 54 Neb. 1, 6–7 (1898). A recent decision of a lower court in Ohio would appear to put that state into this grouping. *State* v. *Hershberger*, 77 O. L. Abs. 487, 495 (1958); but cf. *Tabler* v. *State*, 34 O. S. 127, 134 (1877).

[27] By judicial decision: *Braxton* v. *State*, 17 Ala. App. 167 (1919); *Mosely* v. *State*, 19 Ala. App. 335, 337 (1923); *State* v. *Clark*, 9 Houst. (Del.) 536, 539–540 (Ct. Gen. Sess., 1891); *Conner* v. *State*, 95 Fla. 765 (1928); *Vukodonovich* v. *State*, 197 Ind.

The federal courts at most also retain the weak presumption and the direction is towards its complete abolition. See, *e.g.*, *Kivette* v. *United States*, 230 F. 2d 749, 755 (C.A. 5); *United States* v. *Anthony*, 145 F. Supp. 323, 340 (M.D. Pa.) (cases collected); see also 9 Wigmore, *Evidence* (3d ed. 1940) 425, n. 7.[28]

The common feature of the decisions abolishing the presumption is their recognition that the question is not to be foreclosed by the out-moded concepts of a former age and their acute awareness of the changed status of a married woman. Thus, the Iowa Supreme Court said in *State* v. *Renslow*, 211 Ia. 642, 648–649 (1930):

> A married women of today, in Iowa, has, with rare exceptions, every right, duty, and privilege that her husband has, or that she would have if unmarried. With this emancipation of women from the disabilities of cover-

169, 171–172 (1925); *State* v. *Hollis*, 163 La. 952 (1927); *State* v. *Cleaves*, 59 Me. 298 (1871); *Commonwealth* v. *Helfman*, 258 Mass. 410, 416 (1927); *State* v. *Patton*, 347 Mo. 303, 308 (1941); *State* v. *Asper*, 35 N.M. 203 (1930); *State* v. *Cauley*, 244 N.C. 701 (1956); *Commonwealth* v. *Jones*, 1 D. and C. 2d 269 (Pa. 1954); *State* v. *Boyle*, 13 R.I. 537 (1882); *State* v. *Minor*, 171 S.C. 120 (1933); *Brown* v. *Commonwealth*, 135 Va. 480 (1923); *Martin* v. *Commonwealth*, 143 Va. 479 (1925); *State* v. *Buchanan*, 111 W. Va. 142 (1931); cf. *State* v. *Haines*, 35 N.H. 207 (1857). By statute: Ore. Rev. St. (1958 Supp.) § 44.360 (31); 1 S. Dak. Code (1939) § 13.0503. As far as we can ascertain, Connecticut, Mississippi, North Dakota, Vermont and Wyoming have not passed upon the problem.

[28] Even in *Dawson* v. *United States*, 10 F. 2d 106 (C.A. 9), certiorari denied, 271 U.S. 687, the leading case in support of the unity rule in the federal courts, the court of appeals recognized that the presumption did not apply to crimes more likely to be committed by women than by men.

> ture, the reason for the rule which has heretofore existed at common law, and has been partially recognized in some of our former cases, has vanished, and with it the rule should go.

And in Nebraska, *Smith* v. *Meyers*, 54 Neb. 1, 7 (1898):

> A wife is no longer a marionette, moved at will by the husband, either in fact or in law; and with the legal recognition of a separate and responsible existence, she must assume some of the burdens of life * * *.

And in California, *People* v. *Stately*, 91 Cal. App. 2d 943, 951 (1949):

> We conclude, then, that the reign of the thousand year old presumption has come to an end. In our society, where almost no bride promises to obey her husband, and where it is not accepted as the usual that a wife does what her husband wishes by way of yielding obedience to a dominant will, the basis for the presumption has disappeared. A presumption that has lost its reason must be confined to a museum; it has no place in the administration of justice.

See also *Brown* v. *Commonwealth*, 135 Va. 480 (1923); *State* v. *Hendricks*, 32 Kan. 559 (1884); *King* v. *City of Owensboro*, 187 Ky. 21 (1920).[29]

[29] Even where the presumption has been retained, the courts have looked to present-day realities for its justification. So in a recent Pennsylvania case, its retention was bottomed not upon archaic principles of rigid subservience of wife to husband, nor upon concepts of unity, but upon the court's belief that it was still a valid, if weak, inference that a wife generally follows

3. Just as the changed status of married women has been universally recognized as requiring rejection of the rule relieving a wife of responsibility for crimes committed in the presence of her husband—either in its entirety or in favor of an easily rebuttable presumption—so also it requires rejection of the rule that husband and wife are incapable of conspiracy. The courts of two federal circuits [30] and of at least three states [31] have expressly so ruled, in each case finding in the flexibility of the common law ample scope to adjust its rules to the evolution of the institution of marriage. As early as 1920, the Supreme Court of Colorado could say (*Dalton* v. *People*, 68 Colo. 44, 47):

> The proposition that man and wife are so literally one person that they cannot agree with each other to commit a crime is as discordant with the present policy and tendency of our laws

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her husband's bidding. See *Commonwealth* v. *Jones*, 1 D. & C. 2d 269, 275 (1954):

> The rule of a rebuttable presumption is flexible enough to accommodate itself to a woman's rising independence and to a realistic inquiry whether or not coercion actually exists in any particular case and in a more enlightened age. The quantum of evidence required to rebut the presumption may vary with the spirit of the times but the rule can remain the same indefinitely.

[30] *Johnson* v. *United States*, 157 F. 2d 209 (C.A.D.C.); *Thompson* v. *United States*, 227 F. 2d 671 (C.A. 5); *Wright* v. *United States*, 243 F. 2d 569 (C.A. 5), certiorari denied, 355 U.S. 831; *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5); see also *Ex parte Estep*, 129 F. Supp. 557 (N.D. Tex.), affirmed, 228 F. 2d 320 (C.A. 5), certiorari denied, 350 U.S. 996.

[31] *Dalton* v. *People*, 68 Colo. 44 (1920); *People* v. *Martin*, 4 Ill. 2d 105 (1954); *Marks* v. *State*, 144 Tex. Cr. Rep. 509 (1942); cf. *Smith* v. *State*, 48 Tex. Cr. Rep. 233, 240 (1905).

as it was harmonious with the older laws of England.[32]

The Court of Appeals for the District of Columbia Circuit observed (*Johnson* v. *United States*, 157 F. 2d 209):

> The old rule was based on the common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts, and torts in the District of Columbia. * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action.

A similar recognition that the modern-day parity of the sexes makes obsolete the rule against conspiracy between husband and wife appears in *Ex Parte Estep*, 129 F. Supp. 557, 558 (N.D. Tex.), affirmed 228 F. 2d 320 (C.A. 5), certiorari denied, 350 U.S. 996:

> The wife is no longer hidden in the personality of the husband in America. She has her

[32] The court observed that the reasons for the rule were the unity theory and the control of husband over wife, propositions long abandoned in that state. While the second proposition may have played its part in fashioning the rule, it could not have been of great significance. Even in the field of substantive criminal responsibility, where that principle was primarily applied, it soon became only an evidentiary inference. If that principle was also of significance in the conspiracy field, the rule that husband and wife cannot conspire should have developed early into an evidentiary presumption, rather than having been retained as an absolute rule of immunity.

> separate property; she has a part in the community property; she has the right to vote; in many states she is compelled to serve as a juror; she is a legislator in state and nation; she is a practitioner of law; doctor, judge, preacher, merchant, and in many instances, in the Armed Forces. There is every evidence of complete emancipation for the wife in America. The judge would be bold indeed who would hold, in the face of such evident and fair emancipation, that there can be no unlawful agreeing among themselves.

In their conclusion that the rule that husband and wife are incapable of conspiracy can no longer be supported by the concept of unity on which it was historically based, these cases are, we believe, unanswerable. Unless, therefore, there is some modern-day justification for the rule apart from its antiquity, it should be recognized as obsolete and be abandoned. It is to that question of modern day justification that we now turn.

III

NO MODERN POLICY CONSIDERATIONS SUPPORT THE RULE

We recognize that a rule may have a valid current foundation even though old and invalid formulas are offered in support of it. Thus, in *Hawkins* v. *United States*, 358 U.S. 74, 77, this Court found that the privilege of one spouse to exclude the testimony of the other had a valid present-day rationale even though it had formerly been partly sustained on the outmoded unity theory. So also in *Weiler* v. *United States*, 323 U.S. 606, 608–609, the Court, in refusing to overturn the "two-witness rule" in perjury cases,

found a modern justification for it: "The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."

The final question here, therefore, is whether, despite the present invalidity of the unity concept which is still given as the reason for the rule, there are any cogent factors which support the rule's continuing recognition at the present time. We find none that seem to us to justify retention of the rule.

The arguments for the present-day validity of the rule run as follows: Since the crime of conspiracy is directed primarily at agreement rather than acts, its scope should be carefully circumscribed and it should be applied only where there can be no doubt that at least two wills merge voluntarily. In view of the intimacy and confidence of the marital relationship, there is unlikely to be any arms-length agreement of this nature between husband and wife; regardless of whether the wife approves of her husband's criminal scheme, she will generally agree to it to avoid marital conflict and will follow her husband's lead without that independence of will essential to a true conspiracy. Moreover, it is said, the relationship of the spouses should remain private. The natural repugnance to bringing to light intimate details of a marriage can be out-balanced only by very important social interests, and there is no such prevailing inter-

est where a conspiracy charge is involved.[33] In our view these reasons relate, at best, to the quantum of proof which should be required in a conspiracy charge against husband and wife and do not justify a rule that never, under any circumstances, may a husband and wife be guilty of conspiracy.

1. Taking the reasons advanced in inverse order, the argument of marital privacy seems to us totally invalid. The privacy of marriage is no more a reason for giving immunity to a plot to commit crime than is any other form of privacy. It has never been suggested that the attorney-client privilege gives attorney and client immunity from liability for an active agreement to commit crime. This argument obviously stems from the evidentiary rules barring adverse spousal testimony or the revealing of confidential communications between husband and wife, but it is one thing to say that one spouse may not testify against the other and quite another to say that husband and wife are free to plot crime together.

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[33] See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 950 (1959), and Williams, *Criminal Law* (1953) 523, where certain of these arguments are discussed and then rejected. The primary argument noted in the Harvard Law Review is stated as follows (at 950):

> * * * It is arguable that there is not sufficient increased risk of harm to society resulting from a husband-wife combination to justify a conspiracy conviction. Even when a husband acts alone, it is likely that his wife will know of his activities and will lend at least tacit support. Thus it may be argued that the margin of increased danger to society when the wife proceeds from tacit support to active participation with her husband is sufficiently small not to merit special punishment as conspiracy * * *.

There is no issue in this case as to the testimonial compulsion of one spouse against the other—obviously where both are named as defendants neither one can be compelled to testify at all. There is no question of fostering marital discord through the judicial process. The single issue is whether the government should be permitted to prove, if it can, under all established evidentiary safeguards, that husband and wife were acting in active concert with each other to commit a crime. The evidentiary rules aimed at safeguarding the marital union from discord, and marital confidences from disclosure, afford ample protection to the marital relationship and there is neither need nor reason to expand them into a substantive bar against criminal liability.

2. As to the arguments stemming from the nature of the crime of conspiracy, we suggest that none of them supports a ruling that husband and wife are never punishable for illegal conspiracy. The judgment that agreement of two or more persons to commit a crime, followed by overt acts in furtherance of the agreement, is a danger to society which should be punished is one which was made long ago and which, as noted, has been the judgment of Congress ever since 1867. The conspiracy statute, moreover, plays a particularly important part in federal criminal law since there is no general statute making attempt a crime, and many acts which would amount to attempts in other jurisdictions are punishable under federal law, if the crime is prevented from reaching fruition, only as conspiracies. Thus in federal law it is especially important that the conspiracy statute apply to

all persons who conspire to commit a crime whether or not they happen to be husband and wife. Husband and wife are today separate and discrete individuals in reality as well as in theory, and their unlawful concert should be just as much an offense as any other unlawful combination.

The independence of the wife's will from that of her husband has been universally accepted by legislation recognizing their capacity to make contracts with one another (see note 21, *supra*). The analogy between contractual and conspiratorial capacity is plain. As suggested by Judge Laidlaw in *R.* v. *Kowbel*, 106 Can. Crim. Cas. 65, 67 (Ont. Ct. of App.) (1953):

> [A married woman] was incapable of making an agreement with her husband and because the very essence of the crime of conspiracy is an agreement between alleged conspirators it was not possible for the spouses to commit that offence. If that disability on her part had not existed and the wife had been free to enter into an agreement with her husband, the law would not have regarded them as one person on a charge of conspiracy, but as separate persons each responsible for his or her wrongful act. It follows, in my opinion, that when the incapacity of a married woman to contract with her husband was removed by law and she was given her freedom to exercise her own will and enter into an agreement whether for a lawful or an unlawful purpose, she thereupon became subject to the criminal law respecting conspiracy and became liable for committing that offence.

While a majority of the Canadian Supreme Court refused to accept this view (110 Can. Crim. Cas. 47, *supra*), we think, nonetheless, that it persuasively refutes the claim that husband and wife cannot, as a matter of substantive law, enter into an unlawful agreement. It is unreasonable to say that a married woman may enter into a civil contract with her husband, and yet may not enter into a criminal agreement with him. While there may be a question in any particular case as to whether the illegal scheme was the product of the joint wills of the spouses, that is an issue to be resolved by the evidence in each case, not by a rigid unyielding rule of law.

Finally, the husband-wife combination directed toward unlawful ends presents just as much, and perhaps more, danger to society than any other unlawful combination.[24] The expected intimacy of husband and wife permits them to collaborate freely without fear of the public suspicion that might be aroused by extended personal contact between strangers. At the same time the mutual confidence arising from the marital bonds gives to their conspiracy a strength and cohesiveness difficult to attain by unrelated persons. In short, the marital relationship offers a unique opportunity for effective concert of action which, when turned to unlawful purposes, may have a significantly greater chance of success than other conspiracies.

3. The argument that, in view of the relationship, there cannot be proof of a conspiracy between husband and wife confuses issues of evidence with the

[24] See Note, *Developments In The Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 950 (1959).

question of criminal liability. To say that husband and wife are not within the reach of the conspiracy statute is no different from urging that other groups of individuals may be outside its ambit because of close ties of intimacy. The fact that the conspiracy is between husband and wife, rather than the spousal pair and their child, or one parent and child, or a group of children, siblings, lovers, or business associates should not make a difference on the basic question of liability.[35]

Proof may in some cases be difficult. In some circumstances, the evidence will not show a true agreement between the spouses. It may turn out that the weaker spouse, whether husband or wife, was controlled by the stronger. Perhaps, to protect against unwarranted convictions in those situations, a rebuttable presumption against independence of action should be indulged in. Obviously, also, no inference of conspiracy could be drawn from a mere showing of constant association between husband and wife, as it might be from proof of constant clandestine meetings among strangers, and precautionary instructions to that effect might be appropriate. However, the possible need of more protective evidentiary safeguards in the *trial* of a husband and wife for conspiracy should not affect decision of the sole question posited here, *i.e.*, whether they can be *charged* with that offense.

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[35] So, for example, in *People* v. *Little*, 41 Cal. App. 2d 797 (1940), although a man and woman believed in good faith that they were married, but in fact were not, a conspiracy conviction against them was upheld.

4. None of the reasons advanced in support of the rule, moreover, justify the dichotomy that it creates between a married woman's substantive criminal liability and her immunity from conspiratorial liability. At the early common law, it might have been argued that the unity concept was essentially an embodiment of the generally accepted doctrine of complete subservience of wife to husband. Just as there was a complete bar to a conspiracy conviction of man and wife, there was a complete bar to the wife's conviction for a substantive offense committed in her husband's presence. But, as we have pointed out, that explanation soon fell apart at the common law, and it has even less vitality today. Even in those states which retain the presumption of coercion, it is no more than a weak inference, easily rebuttable (see *supra*, pp. 22–23). Retention of the conspiracy rule would thus result in the incongruous situation that, while a married woman may be guilty of aiding or abetting her husband in the commission of crime (cf. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618–620; 18 U.S.C. 2), she cannot conspire with him. Similarly, despite the conspiracy bar, a married woman can be charged with inciting her husband in the commission of a crime. If she cannot have an equal intent for the purposes of conspiracy, how can she be deemed to have a more powerful will to support a substantive charge of incitement?

A further anomaly is suggested by *Pinkerton* v. *United States*, 328 U.S. 640. The Court there held that, where the commission of the substantive offense of tax evasion was the natural and foreseeable con-

sequence of the conspiratorial agreement, both co-conspirators could be held liable for the substantive offense even though one of them was incarcerated when it actually occurred. Supposing a similar fact pattern, except that the two are husband and wife, who cannot be convicted of conspiracy, and the husband alone commits the substantive crime, could it be said that, despite *Pinkerton*, both could not be convicted for the substantive offense? And if *Pinkerton* were followed, would it not lead to the anomalous result that, while a conspiratorial agreement between husband and wife can be considered in fixing substantive liability, no liability could attach for a crime which was prevented from reaching fulfillment?[36]

In summary, the suggested modern justifications for the rule, if they are anything more than an embellishment upon the old unity theory, are considerations which go to questions of proof rather than to the issue of substantive criminal liability. Such validity as they may have relates to the trial of the case, not to the charge as such. As we have developed, no reason, whether it be sought in the ancient common law or in modern-day experience, supports an immutable rule negating such liability. Accordingly, under settled principles (*supra*, pp. 8–9), the rule should cease to exist. Cf. *Funk* v. *United States*, 290 U.S. 371, 385.

[36] A similar anomaly in the English law is discussed in Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 22 (1947); see also Williams, *Criminal Law* (1953), 524–525.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing the indictment should be reversed and the case remanded for further proceedings under the indictment.

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